Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

The State of Montana, et al.,
Petitioners,
versus
Northern Cheyenne Tribe of the Northern
Cheynne Indian Reservation, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WYOMING AS AMICUS CURIAE

Steven F. Freudenthal
Attorney General of Wyoming
Counsel of Record
Lawrence J. Wolfe
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Of Counsel
Michael D. White
James L. Merrill
Nossaman, Krueger & Knox
511 16th St., Suite 300
Denver, Colorado 80202
(303) 595-9441

QUESTION PRESENTED

DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE McCARRAN AMENDMENT'S SPECIAL GRANT OF JURISDICTION TO THE STATES TO ADJUDICATE FEDERAL AND INDIAN WATER RIGHTS IS NULLIFIED BY A STATE'S CONSTITUTIONAL DISCLAIMER OF PROPRIETARY AUTHORITY OVER INDIAN LANDS?

TABLE OF CONTENTS

Page

Table of Authorities Cited ii

Interest of Amicus 1

Argument 5

I. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONCERNING STATE COURT JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS 5

A. The Ninth Circuit's Decisions Ignore This Court's Interpretation of the Disclaimer Provisions and Conflict With the Tenth Circuit's Interpretation of those Provisions 5

B. The Ninth Circuit's Decisions Ignore the Express Language of Public Law 83-280 Which Renders That Law Inapplicable to the Determination of Indian Water Rights 6

C. The Ninth Circuit's Decisions Ignore this Court's and the Tenth Circuit's Holdings that the McCarran Amendment is a Specific Grant of Jurisdiction to the States to Adjudicate Indian Water Rights 7

II. THE NINTH CIRCUIT'S DECISIONS WILL INTERFERE WITH THE WESTERN STATES'S EFFORTS TO EFFICIENTLY AND EXPEDITIOUSLY ADJUDICATE ALL RIGHTS TO THE USE OF WATER 9

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases — Page

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 7,8,9,10

In re: *the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed in January 24, 1977) 2,3,4

Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979) 3,6,8,9

Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982) 3,5

Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982) 3,5,6,8

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 5,6

Rosebud Souix Tribe v. Kneip, 430 U.S. 584 (1977) 7

San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982) 3,9

United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 6

United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1970) 6

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 6

White Mountain Apache Tribe v. Arizona, 649 U.S. F.2d 1274 (9th Cir. 1981) 5

Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 7

Wyoming v. United States, C 77-039K (D. Wyo. May 31, 1977) 2

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code
18 U.S.C. § 1162(b) (1976) 7

25 U.S.C. § 1322(b) (1976) 7

28 U.S.C. § 1360(b) (1976) 6

43 U.S.C. § 666 (1976) 2,7,8,9,10

United States Statutes at Large
67 Stat. 588 (1953) (Public Law 83-280) 6,7,8

Act of Admission, State of Wyoming
26 Stat. 222 (1890) 1

Wyoming Constitution
Article 21, § 26 1

Wyoming Statutes
Wyo. Stat. § 1-37-106 (1977) 2

Wyoming Rules of Civil Procedure
Rule 24(b) 3

Rule 52(c) 4

OTHER MATERIAL

Adjudication of Water Rights Hearings on S.18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., 6-7, 67-88 (1951) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2188

The State of Montana, et al.,
Petitioners,
versus
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WYOMING AS AMICUS CURIAE

INTEREST OF AMICUS

Wyoming is a disclaimer state.[1] Federal and state courts in Wyoming have considered jurisdiction issues similar to those raised by the instant cases and have sustained state court jurisdiction to adjudicate claims to water for the Wind River Indian Reservation. Relying upon these rulings, Wyoming has spent approximately seven million dollars thus far in its five year effort to adjudicate all Indian, federal, state and private rights to use water in the Big Horn River system.

The decisions of the United States Court of Appeals for the Ninth Circuit herein undermine Wyoming's investment in its general stream adjudication and threaten

[1] Article 21, § 26 of Wyoming's Constitution contains a disclaimer provision virtually identical with those at issue in these cases. While Wyoming does not have an "enabling act" *per se*, its Act of Admission, 26 Stat. 222 (1890) is silent concerning jurisdiction over Indian lands.

the State's efforts to manage its water for the benefit of all of its citizens. A brief history of Wyoming's Big Horn Adjudication will help illustrate the State's interest in the issues raised herein.

In January 1977 Wyoming began a general stream adjudication, pursuant to Wyo. Stat. § 1-37-106 (1977), to determine all rights to use water in the Big Horn River and all other sources of water in Wyoming's Water Division Three,[2] located generally in the northwest quadrant of the State. Pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976), the United States was joined in its proprietary capacity and its fiduciary capacity as trustee for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation.

A month later, the United States removed the case to the United States District Court for the District of Wyoming based on federal constitutional and statutory questions presented by the adjudication. While in federal court, the United States argued that the action did not constitute a "suit" within the meaning of 43 U.S.C. § 666, that the United States had not waived its sovereign immunity and that the court could not determine the water rights held by the federal government. On May 31, 1977, the District Court found that the action was a general stream adjudication and that the United States had waived its soverign immunity. The federal court remanded the action to Wyoming state court, citing congressional policy favoring state court adjudication of water rights.[3]

Later in 1977, the United States moved to dismiss the action for failure to join indispensable parties (the Shoshone and Arapahoe Tribes) and for lack of jurisdiction based on the disclaimer clause of the Wyoming Constitution. The court denied the Unitd States' Motion to

[2] *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed in January 24, 1977).

[3] *See* Findings of Fact, Conclusions of Law and Order Remanding to State Court, *Wyoming v. United States*, C77-039K (D. Wyo. May 31, 1977).

Dismiss and granted leave to the Tribes to intervene permissively pursuant to Wyo. R. Civ. P. 24(b).[4]

In 1979, the United States Court of Appeals for the Tenth Circuit decided *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), holding that the disclaimer provision of the New Mexico Constitution, virtually identical to Wyoming's, did not preclude state court adjudication of Indian water rights in New Mexico. The Tenth Circuit's analysis paralleled that of the Wyoming state court more than a year earlier.

Also in 1979, the Wyoming state court referred the adjudication to a Special Master and directed the Master to report to the Court concerning the water rights of all claimants including the United States as well as the Tribes of the Wind River Indian Reservation.[5] By stipulation of the major parties, the Master first addressed the United States' and Tribes' claims to water for the Wind River Indian Reservation. Thus far, the Master has conducted approximately 130 days of hearings concerning these claims. In all, the Master has heard the testimony of over 80 witnesses and has considered approximately 2400 evidentiary exhibits. Already, the transcript comprises over 18,000 pages. On February 19, 1982, the Master closed the evidence concerning the claims to water for the Wind River Indian Reservation.

Three days later, the Court of Appeals for the Ninth Circuit decided *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), followed within two days by the decisions herein, *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), and *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982).

[4] *See In re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, No. 4993 (Dist. Ct. Wyo. filed January 24, 1977) (Order denying United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction) (Dec. 19, 1977).

[5] *See In re: the General Adjudication of All Rights*, (First Order of Certification and Referral to Master Teno Roncalio and Setting of First Meeting of the Parties, May 29, 1977).

During the week of April 5, 1982, the United States, the Shoshone and Arapahoe Tribes, the State of Wyoming and many private parties filed Proposed Findings of Fact, Conclusions of Law and Interlocutory Decrees concerning water rights for the Wind River Indian Reservation. The Master heard closing arguments concerning this portion of the case on May 10 and 11, 1982, and on May 11, ordered the Indian water rights portion of the adjudication submitted.

As a result of the three February decisions of the Ninth Circuit, Wyoming has asked the state court to reserve and certify the question of its subject matter jurisdiction over the water claims for the Wind River Indian Reservation to the Wyoming Supreme Court pursuant to Wyo. R. Civ. P. 52(c).[6] On May 26, 1982, the United States moved the state court to stay further proceedings pending this Court's disposition of the Petition for Writ of Certiorari or its opinion on the merits herein.[7]

Although Wyoming does not lie within the Ninth Circuit, the opinions below have affected Wyoming's general stream adjudication by forcing the Wyoming state court either to delay further progress in an already lengthy and complex adjudication, or to proceed at the risk of seeing its entire effort threatened by an affirmance of the Ninth Circuit.

[6] *See* Wyoming's Motion to Vacate Position of Order Denying United States' Motion to Dismiss for Lack of Jurisdiction, to Reserve Certain Constitutional Questions for Determination by the Wyoming Supreme Court And to Send Said Questions to the Wyoming Supreme Court, April 13, 1982. *In re: the General Adjudication of All Rights.*

[7] *See* United States' Motion For Stay of Proceedings, May 26, 1982. *In re: the General Adjudication of All Rights.*

ARGUMENT

I. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT CONCERNING STATE COURT JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS

A. The Ninth Circuit's Decisions Ignore This Court's Interpretation of the Disclaimer Provisions and Conflict With the Tenth Circuit's Interpretation of those Provisions.

In *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), the decision below, the Ninth Circuit questioned "[i]n a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Amendment grant jurisdiction and thereby repeal the state disclaimers?" 668 F.2d at 1084. By framing the issue as it did, the court implicity interpreted the disclaimer's "absolute jurisdiction and control" language to mean **exclusive** federal jurisdiction. This Court has clearly rejected that interpretation. *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

Although the Ninth Circuit had earlier recognized that these disclaimers purport to disclaim only a state's ". . . proprietary interest in Indian land, not the states' governmental or regulatory authority . . ." *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981), it failed to apply the distinction in these cases. Nor did the Court below examine the role of a state court conducting a general stream adjudication to determine whether the disclaimer applies.

A general stream adjudication is not "a direct challenge to Indian water rights" as characterized by the Ninth Circuit. Rather it constitutes a comprehensive process in which all rights are determined *inter sese* in ac-

cordance with applicable state or federal law. *See generally, United States v. District Court in and for the County of Eagle*, 401 U.S. 520, 525-26 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527, 529-30 (1970). Hence, the fact of an adjudication does not constitute a proprietary claim by a state to Indian lands, but rather is an exercise of the state's governmental power to determine all water rights for the common good.

In *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), the Tenth Circuit carefully analyzed the nature of a general stream adjudication and concluded that New Mexico's disclaimer does not preclude state court jurisdiction over such an action. 601 F.2d at 1133. The Ninth Circuit refused to follow *Organized Village of Kake* and *Jicarilla Apache Tribe* and provided no sound reason for that refusal.

B. The Ninth Circuit's Decisions Ignore the Express Language of Public Law 83-280 Which Renders That Law Inapplicable to the Determination of Indian Water Rights

In the decision below, the Ninth Circuit concluded that a disclaimer state court cannot assert subject matter jurisdiction over Indian water rights until the state has repealed its disclaimer pursuant to Public Law 83-280. 668 F.2d at 1087. Public Law 83-280, 67 Stat. 588 (1953), is a general jurisdictional statute enacted to respond to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 471 (1979).

While Public Law 83-280 offered the states a mechanism by which they could assume general jurisdiction over Indians on reservations, the law expressly provides that nothing in its terms shall confer jurisdiction upon the state to adjudicate water rights belonging to any Indian or Indian tribe. 28 U.S.C. §

1360(b) (1976); 18 U.S.C. § 1162(b) (1976); 25 U.S.C. § 1322(b) (1976).

By its very terms, Public Law 83-280 does not allow a state to adjudicate water rights belonging to any Indian or Indian tribe. Hence, the Ninth Circuit's conclusion is irrelevant because even if the federal district court had found that Montana **has** assumed Public Law 83-280 jurisdiction (in addition to correctly concluding that wise judicial administartion requires dismissal in favor of ongoing proceedings in state court), such a finding, standing alone, would not enable the state court to adjudicate Indian water rights.

Although water rights are excluded from the scope of Public Law 83-280, Congress had addressed the determination of Indian water rights in legislation passed 13 months before Public Law 83-280. The McCarran Amendment, 43 U.S.C. § 666 (1976), is a special consent to state jurisdiction over federal and Indian water rights which is not limited by the general provisions of Public Law 83-280. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812 n. 20 (1976).

C. The Ninth Circuit's Decisions Ignore this Court's and the Tenth Circuit's Holdings that the McCarran Amendment is a Specific Grant of Jurisdiction to the States to Adjudicate Indian Water Rights

Congress has plenary control over land owned by the United States and held by it in trust for Indians. *See, e.g., Rosebud Souix Tribe v. Kneip*, 430 U.S. 584, 594 (1977). State disclaimers are simply an acknowledgement of this principle which applies in all states, not just those with disclaimers. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Congress exercised this plenary power when it enacted the McCarran Amendment which authorized the states to adjudicate the water rights of Indians along with all other water rights held by the United States as part of a general stream adjudication. *Colorado River Water*

Conservation District v. United States, 424 U.S. 800, 809-10 (1976). While the Ninth Circuit paid lip service to this Court's acknowledgement that section 666 is a special consent to jurisdiction, *Northern Cheyenne Tribe*, 668 F.2d at 1083, the court nonetheless fabricated an exception to the McCarran Amendment which both Congress and this Court have explicitly rejected. *See Adjudication of Water Rights: Hearings on S.18 before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess., 6-7, 67-68 (1951); *accord Colorado River*, 424 U.S. at 811-812.

In its extensive analysis of the scope of the McCarran Amendment, the Tenth Circuit noted that this Court's analysis and footnote 20 of *Colorado River* were "of special application here." *Jicarilla Apache Tribe*, 601 F.2d at 1132. The Ninth Circuit critized the Tenth Circuit and the district court below (which followed the Tenth Circuit) for an analysis which "would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning . . ." *Northern Cheyenne Tribe*, 668 F.2d at 1086.

The disclaimer/non-disclaimer distinction is not threatened, however, in the situation presented here. When Congress enacted Public Law 83-280 it intended to insure that the state jurisdiction granted in the McCarran Amendment, passed one year earlier, would not be undermined by states assuming jurisdiction over Indian water rights through the general provisions of Public Law 83-280.

To accomplish this goal Congress expressly excluded the adjudication of Indian water rights from among those matters over which states could assume jurisdiction pursuant to Public Law 83-280. Any adjudication of these rights in state court can only be undertaken pursuant to the provisions of the McCarran Amendment. The McCarran Amendment makes no distinction between disclaimer and non-disclaimer states but rather is a special grant of jurisdiction to all states. *Colorado River*, 424 U.S. at 800. Clearly the disclaimer/non-disclaimer distinction is of no consequence in determining whether a state has properly assumed jurisdiction over the adjudication of Indian water rights.

II. THE NINTH CIRCUIT'S DECISIONS WILL INTERFERE WITH THE WESTERN STATES' EFFORTS TO EFFICIENTLY AND EXPEDITIOUSLY ADJUDICATE ALL RIGHTS TO THE USE OF WATER

In *Colorado River*, this Court specifically acknowledged both the water-scarcity problem in the West and the western states' efforts to resolve the problem. 424 U.S. at 804. By excluding Indian water rights from the scope of the McCarran Amendment, the Ninth Circuit would frustrate the efforts of the states to adjudicate **all** conflicting water rights in accord with the stated purpose of the McCarran Amendment.

Unlike *Colorado River*, these cases do not involve a choice between a general adjudication in federal court and a general adjudication in state court. Here there are no general adjudications pending in federal court. Thus, as emphasized by Judge Merrill's dissent, prohibiting the state court's general adjudication will result in no effective adjudication and will leave the river systems unadministerable. *San Carlos Apache Tribe*, 668 F.2d at 1099, (Merrill, J., dissenting).

The conflict between the Ninth Circuit's decisions below and the Tenth Circuit's decision in *Jicarilla Apache Tribe* creates an untenable situation on many rivers in the West. For example, the watershed on the Big Horn River encompasses Wind River Indian Reservation lands in Wyoming and Crow Reservation lands in Montana. As it stands, even though Montana and Wyoming have identical disclaimer language in their constitutions, the water rights of the Shoshone and Arapahoe Tribes in the Wyoming portion of the Big Horn River watershed can be determined in a Wyoming general stream adjudication, while the water rights of the Crow Tribe in the Montana portion of the Big Horn River watershed cannot be determined in a Montana general adjudication. As pointed out earlier, however, even the Wyoming proceedings may be imperiled because of the possibility of challenge to the state court's subject matter jurisdiction.

The decisions of the Ninth circuit are clearly contrary to the law and policy expressed by Congress in the McCarran Amendment and by this court in *Colorado River*. The Ninth Circuit decisions below are so clearly erroneous as to warrant summary reversal, particularly since setting the case for full briefing and argument will delay this Court's resolution of the issue and, thus, further delay the western states' efforts to address this burdeoning water problem for yet another year.

CONCLUSION

If allowed to stand, the decisions of the Ninth Circuit will create an impediment to the State's administration of water which Congress and this Court, as well as the Tenth Circuit, have expressly rejected. This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse summarily its decisions below.

Respectfully submitted,

Steven F. Freudenthal
Attorney General of Wyoming
Counsel of Record
Lawrence J. Wolfe
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Of Counsel
Michael D. White
James L. Merrill
Nossaman, Krueger & Knox
511 16th St., Suite 300
Denver, Colorado 80202
(303) 595-9441

July 1982